republished by the execution of the codicils.[16] Further, in the *Piffard* case the testator directed the money to be paid over to the executors of the donee. It therefore came within the rule of substitutionary gifts already discussed.

THE NATURE OF MASSACHUSETTS BUSINESS TRUSTS

The growth of the law is not in the hands of legislators and judges alone; sometimes indeed legislators and judges find themselves at a loss before new legal creations of the profession.

The Massachusetts corporation laws formerly failed to provide for real estate corporations. In Boston the deficiency was met by creating a trust: the beneficial interest in the trust property was divided into transferable shares; the shares, like shares of stock in a corporation, were ordinarily transferable only on the books of the trustees; as with a corporation, too, dividends were declarable from time to time; the deed of trust generally provided for some control of trust and trustees by the shareholders in meeting, and for the continuance of the association beyond the death of its members; contracts and correspondence were made to stipulate that trustees should not be individually liable, and, latterly, that shareholders too, should be free from liability, and the trust fund alone be looked to.[1] Apparently before the courts realized the consequences of the new departure they had held it legal;[2] from then on it proved to offer the business man so many of the advantages and so few of the unpleasantnesses usual to corporations[3] that it has been extended to other fields than dealing in real estate—to manufacturing, for instance—and employed beyond the borders of the home state.

What this new creature is, is something of a problem. It was speedily held, wherever real control was in the shareholders rather than the trustees, to be a trust "which created not a trust, but a partnership;" and partnerships with transferable shares were decided to be legal in Massachusetts.[4] It was laid down, as it so often is, that

[16] The same was true in *Condit v. DeHart* (1898, Sup. Ct.) 62 N. J. L. 78, 40 Atl. 776.

[1] *Cf.* Werner, J., in *Hibbs v. Brown* (1907) 190 N. Y. 167, 196, 82 N. E. 1108, 1118, as to the possible invalidity of a similar clause in bonds of a joint stock company.

[2] Compare the language of Holmes, J., in *Phillips v. Blatchford* (1884) 137 Mass. 510, 512, with that of Knowlton, C.J., in *Hussey v. Arnold* (1904) 185 Mass. 202, 205, 70 N. E. 87, 88.

[3] *Cf. Hussey v. Arnold, supra,* p. 203, and the cases on this subject, *passim.*

[4] *Hoadley v. County Comrs.* (1870) 105 Mass. 519; *cf. Williams v. Milton* (1913) 215 Mass. 1, 102 N. E. 355. In *Case and Comment,* August, 1917, S. R. Wrightington advocates cutting out of these trusts the control by the shareholders: small investors do not demand such control; their chance of changing trustees through decree of court is as good as that of minority holders in a corporation to change directors; the large investors who demand control—who

there was no form of organization intermediate between a corporation and a partnership;[5] provisions as to place of taxation of partnerships have been held applicable to these trusts;[6] a franchise tax sought to be levied on them by the legislature as if on a corporation has been held unconstitutional.[7] But in the association's relations to its creditors the partnership side is much in the shadow in favor of the trust. On contract claims neither the shareholder "partners" nor, where the stipulation has been made part of the contract, the trustees, are liable individually or collectively at law;[8] nor can the trust property be subjected to any lien by attachment, either at law or in equity, in a personal action against the trustee.[9] There remains only a bill in equity to satisfy the claim out of the trust property.[10]

---

would make up the majority holders in a corporation—can be made the trustees; the details of the work can be turned over to a small executive committee. See also that author's *The Law of Unincorporated Associations and Similar Relations*. The present comment is devoted chiefly to those of the trusts which verge on "partnerships."

[5] *Ricker v. American Loan & Trust Co.* (1885) 140 Mass. 346, 348, 5 N. E. 284, 286. But what do words avail in the long run against facts? In *Attorney Genl. v. New York, N. H. & H. R. R. Co.* (1908) 198 Mass. 413, 429, 84 N. E. 737, 743, occurs the following: "All who have a proprietary interest in it [such a trust fund] have rights of property as individual owners, subject to such restraints upon the management and use of it as are legally imposed by the contracts under which it is held. They are equitable tenants in common." So courts speak of directors of a corporation as agents, trustees, and what-not: a part-truth in each epithet. It must be clear on thought, that shareholders in an association whose status is still vague, of necessity possess interests as yet incapable of exact definition.

[6] *Ricker v. American Loan & Trust Co., supra.*

[7] *Gleason v. McKay* (1883) 134 Mass. 419.

[8] See *Hussey v. Arnold, supra,* 203. But where the trustees commit a tort in the course of the business, or make a contract into which the stipulation is not read, personal liability would attach, as with any other trustees. See *Frost v. Thompson* (1914) 219 Mass. 360, 365; 106 N. E. 1009, 1010.

[9] *Hussey v. Arnold, supra.*

[10] See *Frost v. Thompson, supra,* 369. If the trustee makes himself personally liable on obligations incurred in transaction of the trust business, the creditor may proceed either at law against the trustee or in equity to secure to himself the benefit of the indemnity—or, apparently, of the exoneration—due the trustee from the estate, or both. *Mason v. Pomeroy* (1890) 151 Mass. 164, 24 N. E. 202. Whether the creditor's rights against the estate depend on a net balance being due the trustee, as assumed in *Dowse v. Gorton* (H. of L.) [1891] A. C. 190, or are independent of such balance, as held in *Wylly v. Collins* (1851) 9 Ga. 223, and *Manderson's Appeal* (1886) 113 Pa. St. 631, 6 Atl. 893, Massachusetts has refrained from deciding. A special provision in the deed of trust may provide for the appointment of a managing committee or single officer with authority to contract obligations in the name of the association of shareholders; on such an obligation the remedy is apparently a suit in equity against all the shareholders as partners bound by their agent, or to have the debt as a firm debt satisfied out of the firm assets. See *Frost v. Thompson, supra,* 369. Perhaps a provision against shareholders' liability would in such case be held void so far as

As appears from consideration of a late case which turns on that point, *Dana v. Treasurer and Receiver General*,[11] the partnership theory likewise fails to cover to satisfaction the decisions on the nature of the shares of beneficial interest. Of course one object of the attorneys framing these associations has been to give to the shares the character of personal property: at least so far as to make them more readily transferable and avoid the attaching of dower interests. But mere declarations to that effect are not decisive;[12] as to trusts holding realty only, the attempt seems likely, for a while, to meet with little success: equitable interests in foreign realty have been held, even as to a succession tax, to be foreign real estate.[13] What, then, where the trust property is partly real and partly personal? *Partnership* realty will be treated as personalty so far as, and only so far as, is necessary to pay firm debts.[14]

In the *Dana* case a testatrix had died domiciled in Massachusetts. Part of her estate consisted of shares in one of these trusts, the property being a factory, goods, and materials in New Hampshire. The question arose as to the lawfulness of a succession tax at her domicil on "so much of the interest as represented foreign realty." It was held, despite the partnership rule, that where the trust provided for ultimate conversion of the whole property into personalty for distribution, and where the beneficial interest in the realty and personalty together was represented by blanket transferable shares, the whole was a single fund, and must be treated as converted into personalty from the beginning, so that a succession tax levied in the state of the decedent's domicil was valid.

Practical stumbling-blocks would lie in the way of applying the ordinary partnership rule to such a case as this: here the association persists beyond the death of individual members.[15] Exactly how

---

repugnant to the officer's authority and power to bind. If a shareholder has to pay, he may recover contribution from either his fellows or their estates. *Phillips v. Blatchford, supra,* note 2.

[11] (1917, Mass.) 116 N. E. 941. Further discussion of the problem of the Massachusetts trust may be found in an article in (1918) 12 ILL. L. REV. 482, and in Sears, *Trust Estates as Business Companies.*

[12] See *Bartlett v. Gill* (1915, D. Mass.) 221 Fed. 476, 484.

[13] *Walker v. Treasurer & Recvr. Genl.* (1915) 221 Mass. 600, 109 N. E. 647. But as to a succession tax there is a fair distinction, taken below in the text, between succession to a simple equitable interest in foreign realty, and to a share in such interest to which title can be acquired only by book-transfer; which latter again can be compelled only by the courts of the domicile of the trustees and, so to speak, of the trust. The distinction was, however, not taken in *Bartlett v. Gill, supra.*

[14] *Wilcox v. Wilcox* (1866, Mass.) 13 Allen, 252.

[15] This may be expressly provided for in either an ordinary partnership or a joint stock company, as well. For a discussion of the theory, and of the position of a partner's executor before his assent, see Holmes, J., in *Phillips v. Blatchford, supra,* 514, 515; and *Wills v. Murray* (1850) 4 Exch. 843, 868.

much of the trust realty would be needed to settle the trust debts at the moment of any member's death? As to how great a fraction of a decedent's shares would an order of the court be needed to a sale, as of realty? Only burdensome and difficult accounting could give an answer. There have been indications of a readiness to cut the knot by holding the share to be wholly realty, regardless of mixed character of the trust property.[16] Surely the solution in the principal case is saner, if only because it more nearly satisfies the need in the community, which this trust-partnership was called into being to fill. But the decision is rested on no very convincing foundation. It is, to be sure, gratifying to find in the reasoning no trace of any theory that an equitable interest is a mere *chose* in action.[17] But the conclusion that solely because trust property is "one fund from the beginning" and is ultimately to be converted into personalty, it must from the beginning be treated as converted out and out into personal property seems none too well warranted, despite the early English cases.[18] Equitable conversion is a fiction, and a rather violent one; it should be used only where necessary, with every presumption against it, and with eyes open to its fictitious nature.[19] It is justifiable as giving effect to the intention of a testator or settlor with regard to a fund under his disposal at the time.[19]

In a Massachusetts trust each original contributor to the trust capital may perhaps be looked on as a settlor as to whatever amount he contributed; the trust deed would then fix all the settlements on the same terms for all shares. Remains still, however, the question of *when* the conversion is to be deemed effected. The settlors have fixed a definite time for its actual occurrence: the winding up of the trust. It may indeed be conceded that ample reasons of convenience offer for dating any conversion from the trust's beginning; what is difficult to see is wherein these reasons hold with more force to a mixed fund than to one made up wholly of realty.

In this same connection there is a further difficulty with the reasoning of the court. The *situs* of the trust property was New Hampshire. It may be the decision will not be questioned there.[20] But if it is, the

---

[16] So the court in the principal case, p. 944, interprets *Bartlett v. Gill, supra;* referring, it would seem, to pp. 481, 482.

[17] Contrast Langdell (1877) *Summary of Equity Pleading,* 90: "What is called . . . an equitable estate is in truth only a personal claim against the real owner," with Rugg, C.J., in *Peabody v. Treasurer & Recvr. Genl.* (1913) 215 Mass. 129, 131; 102 N. E. 435, 436, referring to shareholders in a trust: "Their rights constitute not *choses* in action, but a substantial property right."

[18] *Ripley v. Waterworth* (1802, Eng. Ch.) 7 Vesey, 425; *Fletcher v. Ashburner* (1779, Rolls Ct.) 1 Bro. C. C. 497.

[19] *Yerkes v. Yerkes* (1901) 200 Pa. St. 419, 50 Atl. 186; and see for a discussion of the nature of the doctrine COMMENTS (1917) 26 YALE LAW JOURNAL, 783.

[20] As was the case in *Re Vanuxem's Estate* (1905) 212 Pa. St. 315, 61 Atl. 876.

courts of the *situs* are not bound by the judgment here rendered; they are free to rule as they see fit on the effect of an instrument purporting to work equitable conversion, and to regulate succession accordingly [21] The Massachusetts decision might be supported as an attempt, in the absence of cases on the point in New Hampshire, to fix upon the common law rule which that state would in all likelihood apply; but unfortunately for the hypothesis, New Hampshire law is nowhere mentioned. It does not seem wise to place a decision needlessly on a ground which may lead, even in a collateral matter, to direct, impotent conflict with the courts of another jurisdiction.

And there was here no need to appeal to the doctrine of equitable conversion. The likeness between these corporation-substitutes and true corporations is striking, and has been made use of by the courts. The *situs* of shares in a corporation for purposes of an inheritance tax is at the domicil of the corporation;[22] so that of shares in such a trust was similarly held to be at the domicil and place of business of the trustees, though the holder of the shares be domiciled elsewhere, and though the certificates be not within the jurisdiction.[23] So also for purposes of administration, shares in the trust like those in a corporation have their *situs* under the Massachusetts law at what we might call the domicil of the trust, though the trust property lie outside the commonwealth.[24]

Scanty though the cases are, it is believed that this analogy is more than superficial. It might well be extended. More and more the fictitious entity idea of the corporation is losing ground in fact and theory; largely in consequence, the one-time distinctions between the

---

[21] *Clarke v. Clarke* (1900) 178 U. S. 186, 20 Sup. Ct. 873.

[22] *Greves v. Shaw* (1899) 173 Mass. 205, 53 N. E. 372; *Matter of Bronson* (1896) 150 N. Y. 1, 9; 44 N. E. 707, 709. The ground for this seems to be that the law of a corporation's creation can make its shares descendable in any way and under any conditions it may please. On the *"situs"* of shares of stock generally, see COMMENTS (1917) 26 YALE LAW JOURNAL, 403; (1917) 17 COLUMBIA L. REV. 151.

[23] *Peabody v. Treasurer & Recvr. Genl., supra.* Though the main ground of this decision is probably that what was sought to be taxed was "an equitable interest in tangible property within the Commonwealth," the court expressly refers to the corporation analogy, on p. 131.

[24] *Kennedy v. Hodges* (1913) 215 Mass. 112, 102 N. E. 432. Administration was referred partly to the book-transfer clause discussed above, note 13, and partly to the corporation analogy. It cannot be held to have been on the ground that the property in the shares was where the certificates were found, as held in *Simpson v. Jersey City Contracting Co.* (1900) 165 N. Y. 193, 58 N. E. 896, for the court expressly refused to admit administration of shares of a foreign corporation whose certificates were within their jurisdiction. See, in harmony, *Winslow v. Fletcher* (1886) 53 Conn. 390, 4 Atl. 250.

corporation and the corporation-substitute are fading out,[25] and should. Shares in a joint stock company, like those in a corporation, have been held personalty without inquiry into the nature of the property held by the company;[26] and the present trust-partnership, where legal ownership of the trust property is not direct, but through a trustee, seems if anything closer to the corporation than is a joint stock company.

To be sure, while the present vicious system of double taxation continues to be applied against corporation shares, the business man has some reason to refrain from over-great rejoicing at too close assimilation of these trust interests with the stock of corporations. Ready transferability may come too dear when it means tax-bleeding at both ends. But as yet the developments along this line are free from objection: they cover only inheritance taxes. Such taxes being levied on the privilege of taking by succession or by will, may legitimately be imposed on any property by each state which takes part in conferring that privilege as to that property. Surely the state of the trust "domicil" takes such part: it alone can force legal title to be vested in the legatee by compelling the trustees to transfer the shares on their books.[27] So in the principal case, while the course of reasoning may not be wholly satisfying, the outcome is. Collection of the tax is just; a step has been taken toward making the trust shares freely transferable as personalty.

Meanwhile one may indulge a harmless, pious hope that in the time of the judges who will make of the Massachusetts trust a cleanly

---

[25] Cf. *Eliot v. Freeman* (1911) 220 U. S. 178, 31 Sup. Ct. 360. There the Federal Corporation Tax Law, 1909, though it covered statutory joint stock companies, was held not applicable to a real estate trust, not organized under a statute. The court did seem to consider the New York joint stock company practically a corporation, opposing it to "joint stock associations at common law." Yet it may well be doubted whether the real estate trust would not have fallen within the law, had organization under a statute been necessary to it. The tax law itself shows the present tendency to lump all corporation-like bodies. See also COMMENTS (1917) 27 YALE LAW JOURNAL, 248, on the waxing liability of stockholders for corporate indebtedness; and COMMENTS, *ibid.* 104, on the desirability of looking behind the fictional entity to determine the enemy alien character of a corporation.

[26] *Beal v. Carpenter* (1916, C. C. A. 8th) 235 Fed. 273.

[27] *Cf. Blackstone v. Miller* (1903) 188 U. S. 189, 205, 23 Sup. Ct. 277, 278: "If the transfer . . . necessarily depends upon and involves the law of New York for its exercize, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax." In that case power over the debtor, the Trust Company, was held sufficient to justify New York in taxing the transfer by will of a deposit, although the decedent was domiciled in Illinois and the transfer tax there had included the New York deposit. The whole course of argument in Mr. Justice Holmes's opinion applies to the situation in the text. Indeed not only logic, but policy, stands far less strongly against double taxation in the matter of succession than elsewhere.

shaped, intelligible thing, will live a generation of legislators who understand the economics of taxation.

ALIENS UNDER THE SELECTIVE DRAFT ACT

The enforcement of the Selective Service Act of May 18, 1917,[1] has given rise to some interesting questions of statutory construction, international law and administrative law. These questions arise out of those provisions of the Act under which certain federal courts have held liable to military service non-declarent aliens who have not properly claimed exemption on the ground of alienage. Section 2 excludes non-declarant aliens from liability to military service under the draft, which is to "take place . . . under such regulations as the President may prescribe not inconsistent with the terms of this Act;" section 5, after requiring all male "persons" within specified ages, including, therefore, non-declarant aliens, to register, provides that "all persons so registered shall be and remain subject to draft . . . unless exempted or excused therefrom as in this Act provided;" section 4, after giving the local and district boards "power to hear and determine . . . all questions of exemption," subject to rules "prescribed by the President," provides that "the decisions of such district boards shall be final," subject to modification "by the President," under rules to be prescribed. The Presidential rules for the exemption of aliens provide that they must file claim for exemption within seven days after notice to appear before the local board, and must support the claim with affidavits within ten days thereafter.

The question of statutory construction involves the possible inconsistency between the absolute exemption of aliens under section 2, and the conditional exemption of registrants under section 5 and under the Presidential regulations authorized by the Act. Failure to comply with the conditions prescribed by the regulations was held by the United States District Court of Montana not to forfeit the absolute immunity of aliens under section 2, apparently on the ground that regulations making exemption conditional would be "inconsistent with the terms of the Act." *Ex parte Beck* (1917, D. Mont.) 245 Fed. 967. Two other United States District Courts, however, found no such inconsistency, reasoning that inasmuch as Congress had the power to authorize the drafting of aliens into military service, it could make the grant of the exemption from service subject to reasonable conditions. *United States v. Finley* (1917, S. D. N. Y.) 245 Fed. 871; *Ex parte Hutflis* (1917, W. D. N. Y.) 245 Fed. 798. An analogous privilege, they held, is the exemption from jury service, which must be claimed. There is, of course, a presumption against inconsistency in the inter-

[1] U. S. Comp. St. Supp. 1917, pp. 61–69.